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No. 00-1250

IN THE

# Supreme Court of the United States

US AIRWAYS, INC.,

*Petitioner,*

v.

ROBERT BARNETT,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE EMPLOYERS GROUP IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | iii |
| INTEREST OF THE *AMICI CURIAE* | 1 |
| STATEMENT OF THE CASE | 2 |
| SUMMARY OF ARGUMENT | 4 |
| ARGUMENT | 5 |
| AN EMPLOYER'S OBLIGATION UNDER THE ADA TO MAKE REASONABLE ACCOMMODATION STOPS SHORT OF PROVIDING A TRUMP CARD GUARANTEEING A PREFERENCE IN JOB PLACEMENT TO AN EMPLOYEE WITH A DISABILITY | 5 |
| I. AS A GENERAL PRINCIPLE, CIVIL RIGHTS LAWS, INCLUDING THE ADA, MANDATE EQUALITY OF OPPORTUNITY, NOT PREFERENTIAL TREATMENT | 5 |
| A. The ADA's Plain Language Requires Only Nondiscrimination and "Reasonable" Accommodation | 5 |
| 1. Like Other Civil Rights Laws, the ADA Prohibits Discrimination Against, But Does Not Promote Discrimination For, Its Protected Class | 5 |
| 2. The ADA Requires Only Objectively "Reasonable" Accommodation, Not Preferences | 6 |
| B. Both the ADA's Legislative History and the Contemporaneous Administrative Interpretation Eschew Preferences | 9 |

TABLE OF CONTENTS—Continued


| | Page |
|---|---|
| C. The Consistent Interpretations of the Courts of Appeals Confirm That the ADA Does Not Mandate Preferences in Hiring or Reassignment | 10 |
| II. REASONABLE ACCOMMODATION DOES NOT REQUIRE GRANTING A PREFERENCE IN JOB ASSIGNMENT OVER THE LEGITIMATE RIGHTS AND EXPECTATIONS OF OTHER EMPLOYEES | 11 |
| A. Reasonable Accommodation Does Not Require Overriding Other Employees' Seniority Rights | 12 |
| B. Reasonable Accommodation Likewise Does Not Supersede Other Legitimate Nondiscriminatory Employer Policies, Including the Management Prerogative To Choose the Best Candidates for Positions | 14 |
| CONCLUSION | 19 |




TABLE OF AUTHORITIES


| FEDERAL CASES | Page |
|---|---|
| *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998) | 17 |
| *Benson v. Northwest Airlines*, 62 F.3d 1108 (8th Cir. 1995) | 4, 12 |
| *Burns v. Coca Cola Enters.*, 222 F.3d 247 (6th Cir. 2000) | 15 |
| *Cassidy v. Detroit Edison Co.*, 138 F.3d 629 (6th Cir. 1998) | 8 |
| *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) | 17 |
| *Christensen v. Harris County*, 529 U.S. 576 (2000) | 17 |
| *Cravens v. Blue Cross and Blue Shield of Kansas City*, 214 F.3d 1011 (8th Cir. 2000) | 15 |
| *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667 (7th Cir. 1998) | 14, 15 |
| *Daugherty v. City of El Paso*, 56 F.3d 695 (5th Cir. 1995) | 10 |
| *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041 (7th Cir. 1996) | 4, 12, 13 |
| *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024 (7th Cir. 2000) | 4, 16 |
| *EEOC v. Sara Lee Corp.*, 237 F.3d 349 (4th Cir. 2001) | 4, 13 |
| *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800 (5th Cir. 1997) | 12, 14 |
| *Gaul v. Lucent Techs., Inc.*, 134 F.3d 576 (3d Cir. 1998) | 8 |
| *Gonzagowski v. Widnall*, 115 F.3d 744 (10th Cir. 1997) | 8 |
| *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) | 6 |
| *Hudson v. MCI Telecomms. Corp.*, 87 F.3d 1167 (10th Cir. 1996) | 8 |

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *Kellogg v. Union Pac. R. Co.*, 233 F.3d 1083 (8th Cir. 2000) | 4, 16 |
| *Kralik v. Durbin*, 130 F.3d 76 (3d Cir. 1997) | 13, 18 |
| *Malabarba v. Chicago Tribune Co.*, 149 F.3d 690 (7th Cir. 1998) | 10 |
| *Milton v. Scrivner, Inc.*, 53 F.3d 1118 (10th Cir. 1995) | 4, 12 |
| *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173 (6th Cir. 1996) | 8 |
| *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784 (8th Cir. 1998) | 4, 13, 14 |
| *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254 (1st Cir. 2001) | 8 |
| *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) | 17 |
| *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) | 11, 14, 16, 17 |
| *Terrell v. U.S. Air, Inc.*, 132 F.3d 621 (11th Cir. 1998) | 11 |
| *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981) | 6 |
| *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538 (7th Cir. 1995) | 8 |
| *Wernick v. Federal Reserve Bank*, 91 F.3d 379 (2d Cir. 1996) | 11 |
| *Williams v. United Ins. Co.*, 2001 U.S. App. LEXIS 11813 (7th Cir. June 7, 2001) | 11, 16 |


STATUTES


| | |
|---|---|
| Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq* | 5 |
| Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* | 3, 5 |
| 42 U.S.C. § 12101(a)(8) | 6 |




TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| 42 U.S.C. § 12101(a)(9) | 6 |
| 42 U.S.C. § 12101(b)(1) | 6 |
| 42 U.S.C. §§ 12111-12117 | 1, 4 |
| 42 U.S.C. § 12111(8) | 7 |
| 42 U.S.C. § 12112(a) | 6 |
| 42 U.S.C. § 12112(b)(5) | 4, 7 |
| Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e *et seq.* | 5 |
| Rehabilitation Act of 1973, Section 503, 29 U.S.C. § 793 | 1, 2 |


REGULATIONS


| | |
|---|---|
| 29 C.F.R. pt. 1630, App. (2000) | 10 |


LEGISLATIVE HISTORY


| | |
|---|---|
| H.R. Rep. No. 101-485, pt. 2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303 | 9 |
| S. Rep. No. 101-116 (1989) | 9 |


OTHER AUTHORITIES


| | |
|---|---|
| *The American Heritage Dictionary* (2d College ed. 1985) | 7 |
| Edward G. Guedes, *Smith v. Midland Brake, Inc.—Writing Affirmative Action Into the Americans with Disabilities Act?*, 73 Fla. Bar J. 68 (Oct. 1999) | 17 |
| 2A Norman J. Singer, *Sutherland Stat. Const.* § 46.06 (6th ed. 2000) | 7 |

The Equal Employment Advisory Council and The Employers Group respectfully submit this brief as *amici curiae*. Letters of consent from both parties have been filed with the Clerk of the Court. The brief urges reversal of the decision below and thus supports the position of Petitioner before this Court.[1]

## INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discrimination in employment. Its membership comprises a broad segment of the business community and includes over 350 of the nation's largest private sector employers. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Employers Group is the largest association of California employers, with over 5,000 employer members employing an aggregate of more than 2.5 million California employees.

All of EEAC's and The Employers Group's members are employers subject to Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111-12117. Moreover, many members are federal contractors subject to Section 503 of the Rehabilitation Act of 1973, 29 U.S.C.

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[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

§ 793, which requires covered employers to take affirmative action to employ and advance in employment qualified individuals with disabilities.

EEAC's and The Employers Group's member companies routinely make reasonable accommodations to allow qualified employees with disabilities to perform essential job functions. In some cases, however, the modification the employee seeks, if granted, would directly impinge upon the rights and expectations of other employees.

Thus, the issue presented in this case is extremely important to the nationwide constituency that EEAC and The Employers Group represent. The Court of Appeals ruled that the ADA's "reasonable accommodation" requirement obligates an employer to make exceptions to a bona fide and established seniority system. Such a ruling essentially gives disabled employees a preference in job placement over their nondisabled peers. This overly expansive view of the ADA's requirements is unsupported by the law and would impose on employers and other employees a burden never intended by Congress. It significantly disrupts not only seniority systems but virtually every other employment policy or practice in which employees may have competing interests.

Thus, EEAC and The Employers Group have an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of their experience in these matters, *amici* are well situated to brief the Court on the concerns of the business community and the significance of this case to employers.

## STATEMENT OF THE CASE

Plaintiff Robert Barnett, a US Airways, Inc. employee, injured his back at work in January 1990. Pet. App. 2a. When he returned to work after a leave of absence, he had difficulty performing the physical requirements of his job in the cargo department. *Id.* Barnett then exercised his rights



under US Airway's seniority policy to obtain a transfer to the mailroom at the San Francisco station, where he remained for two years. *Id.*

In 1992, when all of US Airways cargo and mailroom positions came open for bid, Barnett learned that two other US Airways employees intended to bid for transfers into the mailroom. *Id.* Since both of these employees had greater seniority than he, their transfers would displace him from his mailroom job. *Id.* Barnett wrote to US Airways' Station Manager in San Francisco, asking that he be permitted to remain in the mailroom position. *Id.* at 2a-3a.

In response, US Airways created an additional, temporary "limited duty" mailroom position for Barnett. *Id.* at 50a-51a. Although US Airways policy restricts "limited duty" positions to sixty days, it allowed Barnett to remain in the extra mailroom position for five months. *Id.* at 51a. After five months, Barnett's supervisors told him that because he lacked the seniority to stay in the mailroom and could not perform the duties of a cargo department employee, the company was placing him on leave. *Id.*

Barnett filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC). *Id.* at 3a. He also sought modifications to the cargo department functions, which US Airways declined. The company encouraged him to bid on a job that was available to him at his seniority level and that his physical limitations would allow him to perform, but Barnett did not do so. *Id.*

Barnett sued US Airways under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.* The district court granted summary judgment for US Airways on all of Barnett's claims save one, Pet. App. 108a-109a, and later granted summary judgment on the remaining claim. Pet. App. 87a.

Barnett appealed. A panel of the Ninth Circuit affirmed the district court's decision. Pet. App. 4a. The Court of Appeals granted rehearing *en banc*, Pet. App. 110a, and then reversed the district court. Pet. App. 30a.

US Airways petitioned this Court for a writ of certiorari, which was granted on April 16, 2001.

## SUMMARY OF ARGUMENT

Like other civil rights statutes prohibiting discrimination in employment on the basis of a protected characteristic, Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111-12117, stops short of guaranteeing a covered individual a preference in job placement. The ADA's plain language requires only nondiscrimination and "reasonable" accommodation, 42 U.S.C. § 12112(b)(5), and not preferences, as confirmed by both the legislative history, contemporaneous administrative interpretation, and decisions of the courts of appeals.

For this reason, the ADA's requirement of reasonable accommodation does not obligate an employer to place or retain an employee with a disability in a position when doing so would override the rights of one or more of his coworkers under a bonafide seniority system, whether it is established unilaterally by the employer, *see EEOC v. Sara Lee Corp.*, 237 F.3d 349 (4th Cir. 2001); *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784 (8th Cir. 1998), or through collective bargaining. *E.g., Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041 (7th Cir. 1996); *Benson v. Northwest Airlines*, 62 F.3d 1108 (8th Cir. 1995); *Milton v. Scrivner, Inc.*, 53 F.3d 1118 (10th Cir. 1995). Indeed, the ADA does not supersede other legitimate, nondiscriminatory employer policies, including the management prerogative to choose the best candidates for positions. *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024 (7th Cir. 2000); *Kellogg v. Union Pac. R. Co.*, 233 F.3d 1083 (8th Cir. 2000).



## ARGUMENT

### AN EMPLOYER'S OBLIGATION UNDER THE ADA TO MAKE REASONABLE ACCOMMODATION STOPS SHORT OF PROVIDING A TRUMP CARD GUARANTEEING A PREFERENCE IN JOB PLACEMENT TO AN EMPLOYEE WITH A DISABILITY

#### I. AS A GENERAL PRINCIPLE, CIVIL RIGHTS LAWS, INCLUDING THE ADA, MANDATE EQUALITY OF OPPORTUNITY, NOT PREFERENTIAL TREATMENT

##### A. The ADA's Plain Language Requires Only Nondiscrimination and "Reasonable" Accommodation

###### 1. *Like Other Civil Rights Laws, the ADA Prohibits Discrimination Against, But Does Not Promote Discrimination For, Its Protected Class*

Civil rights laws prohibiting discrimination in employment, such as the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.*, and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.*, secure the rights of individuals not to be treated unfavorably by employers due to a protected characteristic. These laws stop short, however, of requiring *preferential* treatment on any of these bases.

> Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

*Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (Title VII). *See also Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (preferential treatment not required).

The ADA does not depart from this basic principle. It directs that individuals with disabilities be afforded equal employment opportunities, and recognizes that reasonable accommodation may be needed to remove barriers where appropriate. It stops short, however, of requiring that such individuals be granted preferential treatment in hiring, placement, transfer, layoff, or any other employment action.

Nothing in the statutory language encourages, much less mandates, preferences. The ADA reflects Congress' findings that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the *opportunity to compete on an equal basis*," 42 U.S.C. § 12101(a)(9) (emphasis added), and that "the Nation's proper goals regarding individuals with disabilities are to assure *equality of opportunity*." 42 U.S.C. § 12101(a)(8) (emphasis added). Accordingly, the Congressional purpose in enacting the ADA was "to provide a clear and comprehensive national mandate for the *elimination* of discrimination *against* individuals with disabilities." 42 U.S.C. § 12101(b)(1) (emphasis added).

### 2. *The ADA Requires Only Objectively "Reasonable" Accommodation, Not Preferences*

While the ADA recognizes that individuals with disabilities may need some extra assistance in order to obtain an equal opportunity to compete in the workforce, its plain language requires only those accommodations that are objectively reasonable. The ADA prohibits discrimination in employment "against a qualified individual with a disability because of the disability of such individual . . . ." 42 U.S.C. § 12112(a). It defines "discrimination" to include "not



making *reasonable* accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the [employer's] business . . . ." 42 U.S.C. § 12112(b)(5)(A) (emphasis added). In tandem with § 12112(b)(5), the ADA defines "qualified individual with a disability" as "an individual with a disability who, with or without *reasonable* accommodation, can perform the essential functions of the employment position that such individual holds or desires," 42 U.S.C. § 12111(8) (emphasis added). Thus, an employer owes no duty to an individual who could do the job only with an *un*reasonable accommodation—that person would not be "qualified" under the law.

Under well-accepted principles of statutory construction, the word "reasonable," like every other word in the statute, must be presumed to mean something. 2A Norman J. Singer, *Sutherland Stat. Const.* § 46.06 (6th ed. 2000).[2] The word "reasonable," as an adjective modifying the noun "accommodation," limits the scope and degree of accommodation that the ADA obligates any employer to provide. Had Congress intended to require employers to provide every possible accommodation, it could and would have omitted the adjective.

The definition of "reasonable" includes "(2) Governed by or in accordance with reason or sound thinking, (3) Within the bounds of common sense, . . . (4) Not excessive or extreme; fair." *The American Heritage Dictionary* at 1031 (2d College ed. 1985). As the Seventh Circuit has observed,

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[2] According to *Sutherland*, "[i]t is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute." 2A Norman J. Singer, *Sutherland Stat. Const.* § 46.06 (6th ed. 2000) (citing, *inter alia*, *United States v. Menasche*, 348 U.S. 528, 539 (1955)).

"'[R]easonable' may be intended to qualify (in the sense of weaken) 'accommodation,' in just the same way that if one requires a 'reasonable effort' of someone this means less than the maximum possible effort." *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 542 (7th Cir. 1995) .

Whether or not a proposed accommodation is objectively reasonable is an analysis separate and apart from any consideration of either the degree to which it would be effective in allowing the individual to do the job, or whether making the accommodation would impose an undue hardship on the employer's business. Indeed, a facial showing that a proposed accommodation is "reasonable," is part of an ADA plaintiff's *prima facie* case. *See Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001) ("what plaintiff must show further under the statute is that her requested accommodation is 'reasonable' [which] must in some way consider the difficulty or expense imposed on the one doing the accommodating") (citing *Vande Zande*); *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 634 (6th Cir. 1998) ("proposing an accommodation and showing that that accommodation is objectively reasonable" is part of a plaintiff's *prima facie* case)(citation omitted). *See also Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1183-84 n.10 (6th Cir. 1996) (noting that the determination of whether a proposed accommodation is generally "reasonable" is analytically distinct from the question of whether implementing the accommodation would impose an undue hardship on the specific employer). *Cf. Gaul v. Lucent Techs., Inc.*, 134 F.3d 576, 581 (3d Cir. 1998) (holding that plaintiff's requested reassignment—transfer away from stress-inducing coworkers—was "unreasonable as a matter of law."); *Gonzagowski v. Widnall*, 115 F.3d 744, 747-48 (10th Cir. 1997) ("it is unreasonable to require an employer to create a work environment free of stress and criticism"); *Hudson v. MCI Telecomms. Corp.*, 87 F.3d 1167, 1169 (10th Cir. 1996) (plaintiff "failed to present evidence from which a



reasonable jury could find that the accommodation she urges, unpaid leave of indefinite duration, was reasonable"). By requiring only objectively "reasonable" accommodations, the ADA's plain language stops short of requiring preferences.

### B. Both the ADA's Legislative History and the Contemporaneous Administrative Interpretation Eschew Preferences

When Congress passed the ADA in 1990, it confirmed that it did not intend to require preferences. In addition to the legislative findings discussed above, both the House and Senate Committees with jurisdiction over the employment provisions of the ADA stated:

> By including the phrase "qualified individual with a disability," the Committee intends to reaffirm that this legislation does not undermine an employer's ability to choose and maintain qualified workers. This legislation simply provides that employment decisions must not have the purpose or effect of subjecting a qualified individual with a disability to discrimination on the basis of his or her disability.
>
> * * * *
>
> [T]he employer's obligation is to consider applicants and make decisions without regard to an individual's disability, or the individual's need for a reasonable accommodation. But, *the employer has no obligation under this legislation to prefer applicants with disabilities over other applicants on the basis of disability.*

H.R. Rep. No. 101-485, pt. 2, at 55-56 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 337-38; S. Rep. No. 101-116, at 26-27 (1989) (emphasis added).

Likewise, the Equal Employment Opportunity Commission (EEOC), the federal agency with enforcement authority over

the employment provisions of the ADA, incorporated the Congressional mandate against preferences into its 1991 guidance supporting its regulations interpreting the ADA:

> Like the Civil Rights Act of 1964 . . . , the ADA seeks to ensure access to equal employment opportunities based on merit. *It does not* guarantee equal results, establish quotas, or *require preferences favoring individuals with disabilities over those without disabilities.*

29 C.F.R. pt. 1630, App. (2000) (Background) (emphasis added). Thus, the EEOC's interpretation of the ADA contemporaneously with its passage was that the new law did not require preferences.

### C. The Consistent Interpretations of the Courts of Appeals Confirm That the ADA Does Not Mandate Preferences in Hiring or Reassignment

A majority of the circuit courts of appeals to have addressed the issue have concluded that the ADA stops short of requiring preferences. In *Daugherty v. City of El Paso*, 56 F.3d 695 (5th Cir. 1995), the Fifth Circuit stated:

> [W]e do not read the ADA as requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled. It prohibits employment discrimination against qualified individuals with disabilities, no more and no less.

*Id.* at 700 (emphasis added). The Seventh Circuit, citing *Daugherty*, followed suit in *Malabarba v. Chicago Tribune Co.*, 149 F.3d 690, 700 (7th Cir. 1998), noting that "[w]hile Congress enacted the ADA to establish a 'level playing field' for our nation's disabled workers . . . it did not do so in the name of discriminating against persons free from disability."



(citation omitted). *See also Williams v. United Ins. Co.*, 2001 U.S. App. LEXIS 11813, at *4 (7th Cir. June 7, 2001) ("[the ADA] is not an affirmative action statute in the sense of requiring an employer to give preferential treatment to a disabled employee merely on account of the employee's disability")(citations omitted). Also citing *Daugherty*, the Eleventh Circuit has stated, "We cannot accept that Congress, in enacting the ADA, intended to grant preferential treatment for disabled workers." *Terrell v. U.S. Air, Inc.*, 132 F.3d 621, 627 (11th Cir. 1998). *See also Wernick v. Federal Reserve Bank*, 91 F.3d 379, 384-85 (2d Cir. 1996) (noting, with respect to an employee who sought a transfer away from a supervisor who was causing her stress, that the employer "only had an obligation to treat [the plaintiff] in the same manner that it treated other similarly qualified candidates.") (citing *Daugherty*).[3]

## II. REASONABLE ACCOMMODATION DOES NOT REQUIRE GRANTING A PREFERENCE IN JOB ASSIGNMENT OVER THE LEGITIMATE RIGHTS AND EXPECTATIONS OF OTHER EMPLOYEES

Since the ADA does not mandate preferences, and at most "reasonable" accommodations, it does not require an employer to place an employee with a disability in a position when doing so would conflict with the legitimate rights and expectations of other employees. Such rights and expectations can be based on a collective bargaining agreement, an employer-created policy or practice such as the seniority system at issue here, or merely the other employee's superior qualifications for the position.

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[3] *But see Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) (*en banc*) (discussed *infra*).

### A. Reasonable Accommodation Does Not Require Overriding Other Employees' Seniority Rights

As the court below acknowledged, every circuit court of appeals to have addressed the issue has concluded that an employer need not reassign an employee to a position to which another employee is entitled under a collective bargaining agreement. Pet. App. 25a n.9 (citing *Davis v. Florida Power & Light Co.*, 205 F.3d 1301, 1307 (11th Cir.), *cert. denied*, 121 S. Ct. 304 (2000); *Willis v. Pacific Mar. Assoc.*, 162 F.3d 561 (9th Cir. 1998), *amended by*, 244 F.3d 675 (9th Cir. 2001) (amended to distinguish *Barnett)*; *Feliciano v. Rhode Island*, 160 F.3d 780, 787 (1st Cir. 1998); *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 634 (6th Cir. 1998); *Kralik v. Durbin*, 130 F.3d 76, 83 (3d Cir. 1997); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 810 (5th Cir. 1997); *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041, 1051 (7th Cir. 1996); *Benson v. Northwest Airlines*, 62 F.3d 1108, 1114 (8th Cir. 1995); *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1125 (10th Cir. 1995)).

The well-reasoned decisions of these courts have been based consistently on the principle that the ADA does not require an employer to override the rights of other workers. *Foreman*, 117 F.3d at 810 ("the ADA does not require an employer to take action inconsistent with the contractual rights of other workers under a collective bargaining agreement"); *Eckles*, 94 F.3d 1041 (employer not required to violate collectively-bargained seniority rights of other employees by reassigning disabled employee); *Benson*, 62 F.3d at 1114 (employer not required to reassign employee to permanent position where doing so "might implicate the rights of more senior union members") (footnote omitted); *Milton*, 53 F.3d at 1125 (reassignment not required because "plaintiffs' collective bargaining agreement prohibits their transfer to any other job because plaintiffs lack the requisite seniority") (reaffirmed in *Smith v. Midland Brake, Inc.*, 180



F.3d 1154 (10th Cir. 1999)); *cf. Kralik*, 130 F.3d at 83 (employee's request to be excused from forced overtime is not reasonable accommodation because it may require employer to force another employee, with more seniority, to work overtime, violating that person's rights under the collective bargaining agreement). As the Seventh Circuit pointed out, it was not making every provision of a collective bargaining agreement sacrosanct—just those creating rights in other workers. *Eckles*, 94 F.3d at 1052.

Coworker rights and expectations that are grounded in employer-created seniority systems rather than collectively bargained ones deserve the same respect. As the Fourth and Eighth Circuits have concluded, the rationale underlying the decisions holding that the ADA does not trump collectively bargained seniority rights also applies when the seniority system has been established solely by the employer. *EEOC v. Sara Lee Corp.*, 237 F.3d 349 (4th Cir. 2000) (holding that the ADA did not require employer to allow disabled worker to retain position to which coworker with twenty years' greater seniority was entitled under company-established policy); *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784 (8th Cir. 1998) (refusing to require an employer to override its seniority-based bidding system not based in a collective bargaining agreement). In *Sara Lee*, a case much like this one, the Fourth Circuit explained:

> No reason exists for creating a different rule for legitimate and nondiscriminatory policies that are not a part of a collective bargaining agreement. All workers—not just those covered by collective bargaining agreements—rely upon established company policies. The ADA does not require employers to disrupt the operation of a defensible and non-discriminatory company policy in order to provide a reasonable accommodation.

237 F.3d at 355. *See also Moritz*, 147 F.3d at 788 (noting that "Frontier is not required to revise its bidding system," and quoting *Wooten v. Farmland Foods*, 58 F.3d 382, 386 (8th Cir. 1995) ("employer is not required to make accommodations that would violate the rights of other employees")(citation omitted)); *Smith v Midland Brake*, 180 F.3d 1154, 1176 (10th Cir. 1999) (*en banc*) (noting that well entrenched though not collectively bargained seniority system can give senior employees legitimate expectations that employer need not violate); *Foreman*, 117 F.3d at 810 (noting that "even if there were no CBA in place, B & W would not be obligated to accommodate Foreman by reassigning him to a new position"). Where other workers have legitimate expectations that job placements will be made a certain way due to a seniority policy, the ADA does not require an employer to subordinate those expectations as an accommodation for a coworker with a disability.

### B. Reasonable Accommodation Likewise Does Not Supersede Other Legitimate Nondiscriminatory Employer Policies, Including the Management Prerogative To Choose the Best Candidates for Positions

In the same manner, the ADA does not require employers to disregard the rights of coworkers in other situations either. Courts have recognized that legitimate employer policies and practices limit the circumstances under which reassignment may be a reasonable accommodation. In *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667 (7th Cir. 1998), the Seventh Circuit concluded generally that an employer need not "reassign a disabled employee to a position when such a transfer would violate a legitimate, nondiscriminatory policy of the employer . . . " *Id.* at 679. The Seventh Circuit collected examples of such legitimate policies from other circuits, such as a requirement that the individual be neither underqualified nor overqualified for the job; a policy of



preferring full-time over part-time employees for internal transfers; an "up or out" policy under which employees who do not progress at the expected pace are terminated, and a "non-demotion" policy under which employees who are removed from their jobs for performance or business reasons are not entitled to a lower position. *Id.* The Seventh Circuit concluded:

> In fact, we have been unable to find a single ADA or Rehabilitation Act case in which an employer has been required to reassign a disabled employee to a position when such a transfer would violate a legitimate, nondiscriminatory policy of the employer, and for good reason. The contrary rule would convert a nondiscrimination statute into a mandatory preference statute, a result which would be both inconsistent with the nondiscriminatory aims of the ADA and an unreasonable imposition on the employers and coworkers of disabled employees.

*Id.* (citation omitted). *See also Cravens v. Blue Cross and Blue Shield of Kansas City*, 214 F.3d 1011, 1020 (8th Cir. 2000) (adopting Seventh Circuit interpretation that reassignment is not required if it would violate 'a legitimate, nondiscriminatory policy of the employer'); *Burns v. Coca Cola Enters.*, 222 F.3d 247, 257 (6th Cir. 2000) (holding that while employer has a duty to consider transferring employee who cannot perform current job with reasonable accommodation, "[w]e do not, however, hold that the employer must reassign the disabled employee to a position for which he is not otherwise qualified, or that the employer must waive legitimate, nondiscriminatory employment policies or displace other employees' rights to be considered in order to accommodate the disabled individual").

More specifically, the Seventh Circuit has concluded correctly that the ADA does not require an employer to award a vacant position to an individual with a disability as a

reasonable accommodation when another candidate for the position is better qualified. *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1029 (7th Cir. 2000). *See also Williams v. United Ins. Co.*, 2001 U.S. App. LEXIS 11813, at *2-*3 (7th Cir. June 7, 2001) ("the employer is not required to give the disabled employee preferential treatment, as by giving her a job for which another employee is better qualified")(citation omitted). *Accord Kellogg v. Union Pac. R. Co.*, 233 F.3d 1083, 1089 (8th Cir. 2000) ("Nor is an employer required to violate the rights of other employees to accommodate a disabled individual .... It must follow that an employer is not required to make accommodations that would subvert other, more qualified applicants for the job")(citation omitted). In fact, selection decisions are the most basic—and the most common—management judgments. Employers filling vacant positions want to choose the best candidate, using criteria such as past performance, seniority, length of service, knowledge, skill level, and experience. When such a decision is made for a legitimate, nondiscriminatory business reason, it falls within the realm of business judgment unaffected by antidiscrimination laws. Requiring a company to go beyond the reasonable accommodation obligation, however, and accord individuals with disabilities privileged status irrespective of how well they fulfill the selection criteria applied to other candidates for a position would prevent employers from exercising their business judgment to make the best selections for open positions.

For this reason, the opposite view, taken by the Tenth Circuit in *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) (*en banc*), is simply wrong, and should not be considered persuasive by this Court. The Tenth Circuit assumed that where an employee with a disability cannot be accommodated in his or her current position, the employer must reassign that employee to a vacant position for which he or she is minimally qualified even if another candidate is *more* qualified, absent some intervening policy such as a



well-established seniority system. The Tenth Circuit apparently viewed preferential reassignment as a mandate because "reassignment" is one of the possible methods of reasonable accommodation mentioned in the statute. 180 F.3d at 1164. The court reasoned that reassignment "must mean something more than merely allowing a disabled person to compete equally." *Id.* at 1165.

As discussed above, such a broad reading is both antithetical to basic principles of equal employment opportunity and contrary to the statute. *See generally*, Edward G. Guedes, *Smith v. Midland Brake, Inc.—Writing Affirmative Action Into the Americans with Disabilities Act?*, 73 Fla. Bar J. 68 (Oct. 1999). What the Tenth Circuit failed to understand is that allowing an employee the opportunity to compete for a transfer to another position when he or she is not performing adequately in the current position *is* an alteration of the employer's usual and customary procedures. This special consideration, which would not be allowed absent the disability, in and of itself is a significant accommodation.

For the same reasons, the District of Columbia Circuit's *dicta* in *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1304 (D.C. Cir. 1998) (*en banc*), on which the Tenth Circuit relied, misinterprets the ADA.[4]

Granting disabled employees a preference also would unfairly penalize other employees—those who otherwise would have been selected for the position—merely because

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[4] The EEOC has taken a position agreeing with the Tenth Circuit in informal enforcement guidance, which is not entitled to deference from this Court under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Christensen v. Harris County*, 529 U.S. 576, 586-87 (2000). Nor should it be considered persuasive under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)., since it conflicts with the agency's statement in 1991 that the ADA does not require preferences.

they do not have a disability. This is true regardless of whether the employer's practice is to choose employees based on comparative qualifications, as discussed above, or whether placement follows a seniority system. In either situation, another employee has a legitimate expectation that he or she will be placed in the open position. If the Ninth Circuit's view were to prevail, every other employee with superior qualifications for a job would be displaced by an individual whose disability constitutes a trump card. This cannot be the law.

Indeed, if the ADA obligated an employer to make preferential placements, much of the burden would fall on the coworkers displaced by the move. While the employer ostensibly is making the "accommodation," in the sense that it facilitates the placement and accepts a less-than-optimal performer in the job, it is the employee who *would* have had the job whom the action affects most directly. Whether this employee has superior qualifications or merely seniority, losing out to the individual with a disability because of a preference means that this other candidate did not get the job that he or she had every reason to expect. *See Kralik v. Durbin*, 130 F.3d 76, 83 n.8 (3d Cir. 1997) (noting that if an employee's accommodation duty were allowed to override seniority rights, "the employer in its operations may be making no accommodation at all . . . the accommodation instead will be made by the disabled employee's coworkers who will lose a benefit of their seniority status").

The Ninth Circuit's decision places employers in an untenable position. They are bound on the one hand by its interpretation of the ADA and on the other by the legitimate expectations of—and sometimes legally enforceable prior commitments to—other employees.



## CONCLUSION

For the foregoing reasons, EEAC and The Employer's Group respectfully submit that the decision below should be reversed.

Respectfully submitted,

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